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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 FEDERAL TRADE COMMISSION,

4 Plaintiff,

5 v.

23 CV 06188

6 IGVIA HOLDINGS INC., ET AL.,

7 Defendants.

Conference

8 -----x  
9 New York, N.Y.  
August 3, 2023  
2:30 p.m.

10 Before:

11 HON. EDGARDO RAMOS,

12 District Judge

13  
14 APPEARANCES

15 FEDERAL TRADE COMMISSION  
Attorneys for Plaintiff

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(Case called; appearances noted)

THE COURT: Good afternoon. Because the conference is being conducted by telephone I request that you all please endeavor to abide by the instructions provided to you by Ms. Rivera. Try not to speak with one another, and, from my perspective, what I always endeavor to do is ask very precise questions that are capable of being answered succinctly. If you find yourself talking for a little bit, stop, because someone may be trying, i.e. me, to cut in with a question. With that, we can begin.

I note, first of all, that I did receive the parties' joint statement regarding the preliminary injunction hearing. I received it yesterday afternoon. I have reviewed it. However, I have not gotten into the nuance of some of the differences between the parties' positions, between, for example, a 30-person preliminary list versus a 15-person preliminary list, and things of that nature, but we'll see what, if anything, we need to decided today.

So let me begin, first of all, with the question of whether we should have an in-person hearing or not.

Ms. Fleury, let me hear from you first.

MS. FLEURY: Absolutely, your Honor.

We had, as you know, proposed two different options for the Court's consideration: An in-person, live evidentiary hearing with live witnesses, and a submission on the papers.

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1 And we proposed those two options for a couple of reasons. No.  
2 1, we wanted to be sensitive to the Court's scheduling  
3 constrains, and the interest in resolving this matter quickly;  
4 but we also wanted an opportunity to discuss the legal standard  
5 of this 13(b) proceeding in advance of a decision, a final  
6 decision being made on the structure of how to prevent the  
7 evidence, because to the extent there is a disagreement between  
8 the parties over the governing law, that impacts the type of  
9 presentation the Court may wish to hear to resolve -- to apply  
10 the evidence to the legal standard.

11 So with the Court bearing in mind the Court's  
12 instruction to take many pauses, I was going to try to address  
13 the legal standard, and whether there was a disagreement  
14 between the parties first. But I can do this in any order that  
15 you wish.

16 THE COURT: Well, let me ask as well, why will that  
17 affect the presentation of evidence necessarily?

18 MS. FLEURY: That's a good question, your Honor. The  
19 reason it will affect the presentation of evidence, in our  
20 view, is that what I think the defendants were proposing in a  
21 couple of their submissions before this Court is that this is  
22 something akin to a merits trial, that we have a higher burden  
23 of proof than we think we have, and that we think the law  
24 shows. So if the Court is sympathetic to that view, that this  
25 is essentially a merits trial, where we have a higher burden of

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1 proof, then obviously that would affect the amount of evidence  
2 that we want to be able to show you.

3 In either case, either proposal the government has put  
4 forth would allow for you to receive a greater sense, a greater  
5 amount of evidence that goes towards the strength of our case  
6 than the defendant's proposal. But -- so we think we can work  
7 and meet our burden under either option, but it seems that we  
8 --

9 THE COURT: I don't read the defendants' position, and  
10 obviously I'll hear from them, that this is necessarily a  
11 merits trial. I think everyone understands that this is a  
12 preliminary injunction hearing, not a full trial on the merits,  
13 and the question really is whether I apply the standard that  
14 you suggest, which is fair and tenable, as opposed to the  
15 standard that they suggest, which is a serious question. And  
16 is there really such difference between those standards that it  
17 should affect the balance of our conversation?

18 MS. FLEURY: I agree with all that, your Honor. We  
19 agree with actually the serious question standard, the  
20 substantial question standard advanced by the defendants, cited  
21 by the defendants in page 6 of their joint statement, and the  
22 fair and tenable standard. We think the Second Circuit has  
23 addressed whether there were two different standards, also  
24 cited by the defendants, I think it's on page 7 of the joint  
25 statement, and that the Second Circuit in the *Sun & Sand* case

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1 said we don't see those as different standards; they're just a  
2 different way of saying the same standard, which is something  
3 less than finding a probable likelihood of success on the  
4 merits. It's saying the FTC has to raise substantial questions  
5 about the transaction, has to show we have a fair and tenable  
6 chance of receiving winning, and then those questions should be  
7 resolved by the FTC's administrative court in the first  
8 instance. That is the quote that they cite on page 6 of the  
9 joint statement. And we agree with that standard.

10 They also say other things that are inconsistent, but  
11 to the extent we can all agree it's a substantial question,  
12 it's fair and tenable chance, so it essentially means the same  
13 thing. And the Second Circuit has gone with the fair and  
14 tenable chance language, and other circuits have gone with  
15 substantial question, but we've pretty much arrived at the same  
16 place, then I think we can move very quickly past the governing  
17 law and onto the substance of how we should present the  
18 evidence.

19 THE COURT: So if that's the case, I mean, if we all  
20 agree that this is not a merits trial, then why are you  
21 recommending or suggesting that we need the number of witnesses  
22 and the scope of testimony that you're suggesting?

23 MS. FLEURY: Because in order to assess our likelihood  
24 of success on the merits, even if that isn't a particularly  
25 high bar under the law, you want access to the full slate of

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1 what that evidence look likes, what we'll be able to put forth  
2 in the merits trial. Now, we recognize we're not going to get  
3 the 210 hours that we would be entitled to under the merits  
4 proceeding, and so we're trying to come up with ways of showing  
5 you, in a case that does have two different theories of harm,  
6 which is not something that was true in the example cited by  
7 the defendants in their chart. We have a horizontal case and a  
8 vertical case, and we want to be able to show you the breadth  
9 of our evidence and various ways we've alleged harm during this  
10 transaction. And that is why we proposed the number of  
11 witnesses we've proposed, and it is also, recognizing that may  
12 not work for the Court's calendar, has proposed another way,  
13 where we could get that same evidence by robust briefing,  
14 attaching various types of evidence that still shows the  
15 breadth of our case with more than a handful of witnesses over  
16 what would essentially, under defendants' proposal, only allow  
17 the government two and a half days, which is less than a day  
18 per theory when it comes down to it.

19 THE COURT: Yes. The chart that's presented by the  
20 defense concerning the hearings that have been held, they  
21 characterize it as being all of the hearings that have been  
22 held over the last 10 years, and that they've all involved live  
23 testimony.

24 Do you dispute the accuracy of those statements, those  
25 representations?

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1 MS. FLEURY: I do dispute that the chart would  
2 completely include this. The chart itself includes a couple of  
3 nine- and ten-day hearings that we actually think are more  
4 analogous to our case than some of the other examples. It also  
5 omits other hearings that were nine or ten days. And in  
6 addition to that, the SEC is currently engaged in merit  
7 proceedings in a different circuit, which will be a two-week  
8 trial.

9 So I think what that chart shows, which I do agree  
10 with, is every case is different, and there are a range of  
11 types of ways of presenting evidence in a 13(b) proceeding. I  
12 agree with that completely.

13 For this case, we've tried to make a very concrete  
14 estimate, and I can get into more specifics of how we'd use our  
15 40 hours that we're asking for if we do a live evidentiary  
16 presentation. And we've tried our best to figure out various  
17 types of harm we think the transaction presents in a way that  
18 is still, as I said, far less than we get in the merits  
19 proceeding, but does a better job of getting to the breadth of  
20 evidence.

21 THE COURT: Let me turn to Ms. Fiebig. Ms. Fiebig,  
22 what's your view of evidentiary hearing versus on the papers?

23 MS. FIEBIG: Thank you very much your Honor.

24 First and foremost, we agree with your view that  
25 whatever the legal standard is that the Court applies should

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1 not be decided today, nor is it dispositive of the nature of  
2 the hearing that the parties should proceed with. You know,  
3 obviously, from the papers, the parties dispute precisely what  
4 the contours are of the FTC's burden, but there can be no  
5 question that this Court must and should have an opportunity to  
6 take a very serious look at the FTC's case. And we're happy to  
7 brief that as we move forward in these proceedings.

8 I mean, the FTC will file a motion for preliminary  
9 injunction where these motions will be briefed again. We do  
10 recognize this is not a merits trial, but also not  
11 rubber-stamped, particularly because, as we indicated in our  
12 papers, for all practical purposes, this outcome is  
13 determinative. So we think, consistent with the overwhelming  
14 majority of courts in your position, it would be helpful we  
15 hope to your Honor, and most fair to the parties to have an  
16 evidentiary hearing. And that's really all we're here to  
17 discuss today, is sort of what the scope and contours of that  
18 look like.

19 The table that we've put forward shows that there has  
20 not, to our knowledge, been a case in the last 10 years decided  
21 on the paper. Even if you go back further than that, in the  
22 last 45 years, we've only been able to identify two instances a  
23 court decided things on the papers, or purported to.

24 The first is this *Lancaster* case that the FDC relies  
25 upon for this fair and tenable standard back in 1977, and this



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1 has really been overtaken in the interim, but certainly every  
2 court since then agrees there should be an evidentiary hearing,  
3 including because there are some very fact intensive issues the  
4 Court will be asked to resolve. So we can say we would be as  
5 flexible as necessary to fit within the Court's schedule. We  
6 certainly do not think it will be necessary for there to be a  
7 80-hour hearing. We think the parties could proceed on half  
8 the time, and particularly because the government has had over  
9 a year or approximately a year to consider its own evidence,  
10 then we would expect to be able to proceed to put on an  
11 efficient case in far less than 80 hours.

12 THE COURT: Ms. Fiebig, while I have you on the line,  
13 apparently the walk away date from the consummation of the  
14 closing of the deal has moved again; is that right?

15 MS. FIEBIG: You're right, your Honor. We hoped to  
16 provide the Court additional time to render its decision, given  
17 our discussion before you last time and considering that you  
18 already have another trial scheduled for November. So we were  
19 hoping to accommodate the time that the Court would need in  
20 order to make its considered decision on these issues, and the  
21 parties worked very hard to be able to reach an agreement to  
22 extend the outside date to December 15, so that your Honor  
23 would have an opportunity to hear the evidence and issue your  
24 decision.

25 THE COURT: I'm sorry if I'm mispronouncing your name,

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1 Mr. Okuliar?

2 MR. OKULIAR: Yes, Judge. That's right.

3 THE COURT: So what is your position on papers versus  
4 live testimony?

5 MR. OKULIAR: Judge, we would agree with IQVIA. We  
6 think there are a lot of fact issues at dispute here, and so a  
7 live hearing would be ultimately better than the papers, so we  
8 would like to have the opportunity for live testimony.

9 THE COURT: Okay. So like I said, I haven't had an  
10 opportunity to digest entirely the positions of the parties,  
11 but I have taken a look at my calendar, and what I can do and  
12 what I will do is I can begin a hearing on Monday, November 20.  
13 That of course is Thanksgiving week. We'll go two and a half  
14 or three days that week, and then I have the following week  
15 that I can provide to the parties. I don't know that you'll  
16 need seven and a half or eight days, and I would rather that  
17 you do it in less time than that and maybe save some time for  
18 closing argument, but for right now, that is when -- so I will  
19 have a hearing, and it will be over that period of time.  
20 Hopefully, with that guidance, you can work backwards in terms  
21 of the number of witnesses, agree on the number of witnesses  
22 that both sides will put on, et cetera. If we go ahead and  
23 have it during that time, you'll get an opinion as soon  
24 thereafter as possible.

25 I do note that I think it will have to -- it will

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1 include an extension of the TRO that's currently in place,  
2 which expires I believe on the 22nd. So it will have to go  
3 beyond then obviously.

4 MS. FIEBIG: Thank you, your Honor. This is Chantale  
5 Fiebig for IQVIA.

6 We will confer with the government about the TRO, and  
7 hope to submit a stipulated TRO to you. I just wanted to ask  
8 to clarify, did you indicate if the hearing begins on the 20th,  
9 we can go two and a half days that week, and then the balance  
10 of the week of the 27th, through December 31st if necessary?

11 THE COURT: Correct. That amount of time will be made  
12 available to you. I would hope that you can agree to use less  
13 than all of that time, but if we need it, that's what we have.

14 MS. FIEBIG: Understood. Thank you, your Honor.

15 MS. FLEURY: Thank you, your Honor. This is Jennifer  
16 Fleury with the FTC.

17 We can work within that window. We appreciate it.  
18 And we will have conversations with the defendants about  
19 extending the TRO. I think one thing that would be helpful in  
20 coming to ground and not having to do incremental extensions is  
21 trying to think through, both sides, about how much time makes  
22 sense in terms of a decision, because we would want any  
23 extension to extend past that.

24 I have looked into that a little bit, your Honor, and  
25 it seems like why this is not -- for cases about this length,

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1 normally judges take around 35 days, so I just wanted to --  
2 again, I don't know how much time the Court will require, but  
3 that's something to think about, is how much time on the back  
4 end for making a decision is, and the post-hearing submissions,  
5 if any.

6 THE COURT: I don't know if there's going to be time  
7 for post-hearing submissions, but at this point it's impossible  
8 for me to tell you how long it's going to take. I will  
9 endeavor to do it as quickly as I possibly can. We'll wait to  
10 hear from the defense. There was a representation that it  
11 could not possibly be moved the last time we were all together,  
12 and then low and behold, it moved.

13 I'm going out of my way to, in the middle of all of  
14 this, to provide you all with as much time as possible to  
15 present new evidence, and I will get you an answer as soon as I  
16 can thereafter. But obviously --

17 MS. FLEURY: Totally understood, your Honor.

18 THE COURT: -- as much flexibility as can be provided  
19 by all sides will be appreciated.

20 MS. FLEURY: Absolutely.

21 THE COURT: In any event, you'll get my decision when  
22 you get my decision, and all I can tell you is it will be as  
23 soon as I can.

24 MS. FLEURY: Thank you, your Honor.

25 THE COURT: So, with that, what else do we need to

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1 decide today?

2 Ms. Fleury?

3 MS. FLEURY: This is Jennifer Fleury for the FTC.

4 I'm open to discussing further issues, if the  
5 defendants prefer, but I think it might be worthwhile -- we  
6 were making progress, including an exchange of emails today on  
7 various points for compromise, and so I think it might be  
8 worthwhile for us to take the information and the guidance the  
9 Court has helpfully given us today, and go back and see if we  
10 can come up with a more comprehensive proposal, and compromise  
11 on whatever we can compromise on, working backwards from the  
12 schedule that you set.

13 THE COURT: That would certainly be very helpful to  
14 the Court.

15 Ms. Fiebig?

16 MS. FIEBIG: Yes.

17 MS. FLEURY: That was Ms. Fleury, for the FTC.

18 MS. FIEBIG: Nothing else.

19 THE COURT: Mr. Okuliar?

20 MR. OKULIAR: Yes. Thank you, sir. That's it.

21 THE COURT: Okay. So do you need me any further this  
22 afternoon?

23 Ms. Fleury?

24 MS. FLEURY: Nothing from the FTC.

25 THE COURT: Ms. Fiebig?

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MS. FIEBIG: No. Thank you very much, your Honor.

THE COURT: Mr. Okuliar?

MR. OKULIAR: No. Thank you very much, your Honor.

THE COURT: Okay. Then I'll wait to hear from you on any further scheduling issues, given the dates that I have provided for the hearing, working backwards from there, and any unconsented to issues concerning witnesses, et cetera.

With that, do get back to me as soon as you are able, okay?

We're adjourned. Take care of everyone.

(Adjourned

MS. COLSON: Thank you journals.

Q. 3 people Thank you, your Honor.